Supreme Court, U.S.
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MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975.

No. 75-821

EARL BUSH,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

PETITION FOR REHEARING.

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BLEED THROUGH

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The Petitioner herein respectfully moves this Court for an order (1) vacating its denial of the Petition for Certiorari, entered on March 22, 1976, and (2) granting the Petition. As ground for this motion, Petitioner states the following:

I.

A MARCH 17, 1976, LETTER TO MICHAEL RODAK, JR., FROM SOLICITOR GENERAL ROBERT H. BORK MAY NOT HAVE BEEN BROUGHT TO THE ATTENTION OF EACH JUSTICE OF THIS HONORABLE COURT PRIOR TO EACH JUSTICE'S DECISION NOT TO GRANT THE PETITION FOR WRIT OF CERTIORARI.

On March 19, 1976, Petitioner's Attorney received a courtesy copy of a March 17, 1976, letter to Michael Rodak, Jr.,

a copy of which is appended hereto. The Solicitor General requested Clerk Rodak to bring his letter to the attention of each of the Justices. However, it is Petitioner's understanding that this Honorable Court was in recess during the two weeks prior to its ruling on the instant Petition for Writ of Certiorari. Accordingly, Petitioner fears that this letter may not have been brought to the attention of and considered by each Justice prior to each Justice's decision not to grant certiorari in this cause.

Mr. Bork's letter was proper and appropriate. In the government's memorandum in opposition to the Petition for Writ of Certiorari, it had asserted that the Petitioner had not presented to the Court of Appeals his contention that the mailings charged in the indictment were not sufficiently related to the alleged scheme to provide a basis for a conviction under the Mail Fraud Statute for the reason that any alleged scheme had been consummated at the time of the mailings. In Petitioner's reply brief, he pointed out that the contention *was* presented to the Court of Appeals in his Petition for Rehearing. Mr. Bork's letter reviews the circumstances and constitutes a partial confession of error, to the extent that the Solicitor withdrew his prior suggestion that review of that contention would be inappropriate.

It remains Petitioner's contention that this mail fraud prosecution and conviction lies far outside the proper ambit of the federal mail fraud statute, particularly in light of this Court's recent ruling in *United States* v. *Maze*, 414 U. S. 395 (1974), where no mailing charged in this case constituted a necessary part of the alleged fraudulent scheme or transaction which led to the Petitioner's receipt of the monies, and where each relevant mailing charged merely is a letter transmitting funds (already paid to, received and owned by the Petitioner) from one of his bank accounts to the other. Moreover, Petitioner contends that these transmittal letters in no way serve to conceal or delay discovery of any purported scheme; if anything,

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the mailings increased the probability that Petitioner Bush's alleged fraudulent scheme would be detected.

Because Petitioner's conviction so severely violates this Court's pronouncement in *United States* v. *Maze*, 414 U. S. 395 (1974), Petitioner wishes to be certain that this Court did not deny certiorari based on the Solicitor's inadvertent misrepresentation concerning the preservation of this issue for consideration by this Court. Because the Solicitor's letter was sent so close in time to the date on which the Petition was denied, and during a week in which this Honorable Court was in recess, Petitioner feels that this request for rehearing is necessary.

II.

THE DENIAL OF THE PETITION FOR WRIT OF CERTIORARI IN THIS CAUSE, IN THE VIEW OF THE UNITED STATES ATTORNEY FOR THE NORTHERN DISTRICT OF ILLINOIS, EVIDENCED BY PUBLIC STATEMENTS, HAS SOLIDIFIED AND SECURED THE SEVENTH CIRCUIT'S NOVEL, UNPRECEDENTED AND EX POST FACTO CONSTRUCTION OF THE MAIL FRAUD STATUTE.

This was a political trial. However, Petitioner Bush was neither a politician or a public official. A great volume of publicity attended the trial and appeal of this case. On March 22, 1976, the date on which the Petition for Writ of Certiorari was denied, United States Attorney Samuel K. Skinner, for the Northern District of Illinois, stated as follows:

> (SKINNER)
>
> (CHICAGO)—U. S. ATTORNEY SAMUEL SKINNER SAID TODAY THAT MORE PUBLIC OFFICIALS WILL BE INDICTED SOON AS THE RESULT OF U. S. SUPREME COURT RULINGS THAT UPHELD THE CONVICTIONS OF EARL BUSH AND FORMER CHICAGO ALDERMAN THOMAS KEANE.
>
> U. S. ATTORNEY FOR THE NORTHERN DISTRICT OF ILLINOIS, SKINNER SAID HE IS ELATED BY THE SUPREME COUR'S REFUSAL YESTERDAY TO HEAR APPEALS FROM KEANE AND BUSH, WHO WAS MAYOR DALEY'S PRESS SECRETARY FOR 18 YEARS.

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SKINNER SAID HE THINKS THE MAIL FRAUD STATUTE CAN BE USED IN THE VERY NEAR FUTURE IN SIMILAR APPLICATIONS, SAYING THE HIGH COURT HAS REAFFIRMED THE CONCEPT OF MAIL FRAUD PROSECUTIONS.

HE SAID HE EXPECTS BOTH KEANE AND BUSH TO SURRENDER IN THE NEXT SEVERAL WEEKS TO BEGIN SERVING THEIR SENTENCES.

THE 70-YEAR-OLD KEANE WAS CONVICTED OF CONSPIRACY AND MAIL FRAUD CHARGES STEMMING FROM BEHIND-THE-SCENES REAL ESTATE DEALS WHILE HE WAS THE MOST POWERFUL MEMBER OF THE CITY COUNCIL.

BUSH WAS CONVICTED IN CONNECTION WITH HIS OWNERSHIP OF AN ADVERTISING FIRM WHICH WAS AWARDED A CONTRACT FOR ADVERTISING DISPLAYS AT O'HARE AIRPORT.

(APB 212—353; March 22, 1976)

The foregoing release was widely distributed over the wire services and broadcast on numerous radio and television stations.

Hard cases make bad law. Politicians who commit wrongdoings should be convicted and punished, as should any other person who commits wrongdoing. But they should be convicted pursuant to clearly defined statutes which adequately notify them regarding the propriety of their actions.

Prior to this case, there has never been a mail fraud prosecution of a *non-elected* public employee for defrauding the public, in general, of their right to conscientious performance of official duties, which conduct admittedly did not involve a violation of the criminal law. Petitioner Bush consulted attorneys between 1961 and 1965 concerning his ownership of the airport advertising company, and was advised that it was legal. Moreover, Petitioner Bush attempted to influence no one: He told no one about his interest in the advertising company: The advertising company submitted the best bid, and therefore was awarded the contract, in absence of any knowledge of Petitioner's ownership of the company. The

Seventh Circuit panel confirmed that Petitioner committed no extortion or bribery, nor did he pay out or receive any kickbacks or violate any state criminal law. Had Petitioner Bush disclosed his ownership of the advertising company and attempted to influence votes in his favor, he certainly would have been guilty of a crime. His scrupulous non-disclosure, under the law of this case, also pronounces him guilty. The citizens of Chicago lost nothing—in fact the City made money —by the airport advertising contract. The City continues to maintain the advertising arrangement (although Petitioner disposed of his ownership and all his interest) because the service from the display people and the compensation to the City have been evaluated as the best that any aviation facility has received in the United States.

This conviction under the federal mail fraud statute is based on the theory that Petitioner's non-disclosure of his ownership of an advertising display company constituted a breach of his moral duty to the Mayor and citizens of Chicago. Moreover, Petitioner stands convicted for conduct commencing in 1961 and carrying through 1973. Through the year 1973, in the Seventh Circuit, as well as in this nation, the critical element of a mail fraud prosecution was "fraudulent intent". *United States* v. *George*, 477 F. 2d 508 (7th Cir. 1973). Not every breach of a fiduciary duty works a criminal fraud.

With the advent of *United States* v. *Isaacs*, 493 F. 2d 1124 (7th Cir. 1974), Seventh Circuit law with respect to mail fraud began its rapid evolution. *Isaacs* also was a political trial. The Seventh Circuit plainly admitted that in order to uphold the conviction in Bush's case it was necessary to interpret this case as "a hybrid situation linking some of the pure business fraud aspects of *United States* v. *George, supra,* with the use of public office for private considerations of *United States* v. *Isaacs, supra.*" (Slip. Op. at 8-9.)

None of the authorities relied upon by the government or by the Seventh Circuit throughout the course of these proceedings

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involved a non-elected public employee charged with defrauding the public of its loyal services. Rather, the cases cited as authorities by the government and the Seventh Circuit involve bribery, kickbacks or other violations of the law. As the Seventh Circuit itself stated in its opinion in the instant case:

> What makes this clear so difficult is perhaps the subtlety of the scheme in which Bush was engaged. There is no concrete evidence of extortion, bribery, kickbacks or a violation of any criminal law other than the mail fraud statute. (Slip Op. at 8)

To conclude that the citizens of Chicago were defrauded, when not one citizen lost a single penny by the Petitioner's action (nor could the city have made a single penny more had Petitioner Bush not owned the advertising company) is mere speculation. The Seventh Circuit's speculation concerning possible benefits to the City of increased revenue had Bush's interest been disclosed is not supported by any evidence on the record. Petitioner Bush did not receive any benefit as a result of his position as press secretary to Mayor Daley. Petitioner Bush's interest in the advertising company was a purely business arrangement that was not itself illegal. The Seventh Circuit now has provided that legislation—*ex post facto* judicial legislation!

If Congress intended, by the mail fraud statute, to prohibit the conduct engaged in by Petitioner Bush as alleged in this indictment, then the statute on its face is vague, uncertain and fails to give notice of the conduct sought to be prohibited. If, however, the intention of Congress is clear, then the Seventh Circuit's interpretation of that statute as prohibiting Petitioner Bush's conduct constitutes so novel and unforeseeable an interpretation of the mail fraud statute as to declare Bush's conduct illegal *ex post facto*.

Petitioner Bush was prosecuted and convicted for a "crime" that was not a crime when he allegedly committed it. The imposition on Petitioner Bush, or any other citizen, of criminal

liability where no affirmative criminal acts were done in conjunction with the use of the mails would subject not only every elected or appointed official, but every citizen, to the whims and changing standards of morality of a government that otherwise has completely failed to define standards of conduct by statute. If this case is allowed to stand, any public official, judge or appointed governmental employee, such as Bush, who has kept his personal financial affairs private, will be exposed to the government's charge of a crime without any showing of fraudulent intent or actual fraud.

CONCLUSION.

For the reasons set forth above, as well as those contained in the Petition for Writ of Certiorari, Petitioner prays that this Court grant rehearing of the order of denial, vacate that order, grant that Petition and review the judgment and opinion order.

Respectfully submitted.

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EDWARD M. GENSON,
THEODORE M. BECKER,
J. SAMUEL TENENBAUM,
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Attorneys for Petitioner.

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CERTIFICATE OF COUNSEL.

As Counsel for the Petitioner, I hereby certify that this Petition for Rehearing is presented in good faith and not for delay and is restricted to the grounds specified in Rule 58(2).

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SAM ADAM,

Counsel for Petitioner.

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APPENDIX.

OFFICE OF THE SOLICITOR GENERAL,
Washington, D. C. 20530.

March 17, 1976

Michael Rodak, Jr., Esquire
Clerk, Supreme Court of the
United States
Washington, D. C. 20543

Re: Earl Bush v. United States,
No. 75-821

Dear Mr. Rodak:

On page 4 of the government's memorandum in opposition to the petition for a writ of certiorari in the above-captioned case, we incorrectly stated that petitioner had not presented to the court of appeals his contention that the mailings charged in his indictment were not sufficiently related to the fraudulent scheme to provide a basis for a conviction under the mail fraud statute, for the reason that the scheme allegedly had been consummated at the time of the mailings. At page 2 of his reply brief, petitioner correctly notes that that contention was presented to the court of appeals in his petition for rehearing.

Accordingly, we withdraw our suggestion that review of that contention would be inappropriate under *Adickes* v. *S. H. Kress & Co.*, 398 U. S. 144, 147 n.2, and *Lawn* v. *United States*, 355 U. S. 339, 362-363 n.16. However, for the reasons stated at page 5 and 6 of our memorandum in opposition we continue to believe that petitioner's contention rests upon a factually incorrect premise and is without merit.

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I would be grateful if you would bring this letter to the attention of each of the Justices, and to that end I am enclosing herewith nine copies.

Sincerely,

/s/ ROBERT H. BORK,
Robert H. Bork,
Solicitor General.

Enclosures

cc: Sam Adam, Esquire
134 North LaSalle Street
Suite 300
Chicago, Illinois 60602